

Citizenship by Religion

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India is presently witnessing a [country-wide mass uprising](#) against the Citizenship (Amendment) Act, 2019, which purposefully aims to grant migrants belonging to six enlisted communities an easy path to Indian citizenship, while denying the same to others – notably Muslims. This Act is unconstitutional as it exploits deliberate omissions on citizenship rules in the constitution while it ignores the constitutional design which is fundamentally based on equality and secularism.

The parent statute of [1955](#) defines an ‘illegal migrant’ as someone who has entered India without a valid passport or travel documents, or has stayed in India beyond the permitted period. The 2019 Amendment Act aims to insert the following religiously-charged proviso to the definition of illegal migrant

“Provided that any person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan, who entered into India on or before 31st day of December, 2014 ... shall not be treated as illegal migrants for the purpose of this Act.”

For the 6 mentioned communities, the Act also reduces to half the minimum period of residence or service of a Government required for citizenship by naturalization.

During the speeches before and subsequent the passage of the Act, leading figures of the ruling ‘Hindutva’ driven Bhartiya Janata Party (BJP) presented a very mindful usage of specific terminologies for different religious groups on a generalized level – ‘*refugee*’ for a Hindu, Sikh, Jain, Buddhist, Parsi and Christian; and ‘*illegal immigrant*’ for others. The Citizenship Amendment Act is nothing but an exercise towards securing political gains by the BJP and [might face judicial scathing in the pending litigation](#)

A journey to the past

When the Constituent Assembly of India initiated its deliberation in December 1946, there was no agenda for including provisions pertaining to citizenship in the Constitution as it was believed that citizenship norms must ideally be set by the Parliament. However, the untimely partition of India and Pakistan disrupted the Assembly proceedings and it became necessary to decide upon the citizenship norms for the divided India. The result is Part II of [the Constitution](#) which gives preference to the idea of *jus soli* citizenship (citizenship by birth place, Article 5) – considered as ‘enlightened, modern civilized and democratic citizenship’ – over religious citizenship ([Choudhry, et al. 2016](#)). This provision was overridden by a much-contested Article 7, also termed as an ‘obnoxious clause’ by Late Jaspat Roy Kapoor, which intended to exclude those from citizenship who left India for Pakistan after 1st March 1947 but saved those who came back to India under a permit of

resettlement or permanent return and sought official registration. However, a similar clause, finally drafted as Article 6, which was intended to grant citizenship rights to immigrants from the territories of Pakistan (which included Hindus of undivided India residing in territories given to Pakistan after the Partition) was unsurprisingly accepted without much contestation. This shows how religion played its part in the debates while deciding the questions of citizenship though better sense ultimately prevailed and a secular idea of citizenship was accepted.

Part II was drafted merely to decide the question of citizenship at the moment of its enactment. In the words of Dr. Ambedkar, they were meant only as an 'ad-hoc' arrangement 'for the time being', as also envisaged under Articles 10 and 11 of the Constitution. These provisions reserve the power of the Parliament to make any law concerning citizenship notwithstanding Part II and make the continued enjoyment of the citizenship subject to such laws.

Pitfalls of Omission

The repercussions of this omission were first seen in the 2004 Amendment that inserted Section 8A to the Citizenship Rules of 1956 (Repealed later in 2009). It was a covert attempt by the Legislature to put religious identity at the forefront by conferring eased citizenship to '*minority Hindus with Pakistan citizenship*', who migrated to the States of Rajasthan and Gujarat. The legislature did not deem it fit to question the intentions of these immigrants similar to the manner in which it questioned the intentions of Pakistani immigrants coming to India under Article 7 (most of whom were unsurprisingly Muslims) at the time of independence.

Though not the first attempt to religiously color the citizenship question, this was indeed the first explicit attempt. Previously, the Citizenship Act had been amended in a secular fashion in 1985 to deal with citizenship matters concerning immigrants to Assam, specially from Bangladesh post 1971 War. It was to detect the inflow of illegal immigrants and strip them of citizenship rights.

Therefore, the failure of the drafters to constitutionally entrench citizenship provisions have led to religiously-motivated understandings of citizenship on multiple occasions. On the one hand, restrictions are placed on illegal migrants coming to Assam, but on the other, illegal migrants are deemed as refugees when they are part of the Hindu minority in the Muslim-nations. Jayal notes that '*despite the victory of the jus soli conception of citizenship at the constitution-making stage, there has been a gradual and subtle shift towards a jus sanguinis conception*'.

Infringing the principle of equal treatment

Article 14 of the Constitution guarantees '*every person*' the right to equality before the law and equal protection of laws within the Indian territory. The emphasis on the phrase 'every person' is to establish that the fundamental right to be treated equally has been entrenched in the Constitution without any pre-requirement of citizenship. In a recent case concerning the unconstitutionality of [*Triple Talaq*](#).

the Supreme Court concluded that a constitutional infirmity is found in Article 14 whenever a '*legislation is manifestly arbitrary, i.e. when it is not fair, not reasonable, discriminatory, not transparent, capricious, biased, with favoritism or nepotism and not in pursuit of promotion of healthy competition and equitable treatment*'.

The Amendment Act falls short of these requirements as it arbitrarily allows certain communities to acquire citizenship, while it excludes other communities from that possibility. Moreover, the fact that it creates a different timeline for Naturalization purposes for people migrating from Pakistan, Afghanistan and Bangladesh again creates an arbitrary difference in treatment of the people migrating from other nations.

The Amendment was also tried to be introduced previously in 2016. At that time, the Home Minister attempted to cast a humanitarian image during the Parliamentary debates and he stated in the Upper House [[Rajya Sabha Debates, 09.01.2019 at p. 66](#)] that the reason for the introduction of the Act is to provide shelter to the minorities of the three states who are facing religious persecution, a claim again repeated by the Home Minister in 2019. However, the Act's 'Statement of Objects and Reasons' explicitly states that its reason is to grant citizenship to those illegal migrants (of the six religious minorities) who are ineligible to apply for Indian citizenship due to the lack of valid travel documents or expiration of their documents. There is no reference to the pre-requirement of establishing persecution, and it seems that the Government has implicitly inserted the presumption of persecution – a presumption which is factually unproved, if not incorrect.

If the Act were indeed to cover persecuted minorities, it would have been a matter of applause. In fact, however, it excludes from its application all those Muslims – like Ahmadiyas and Shias – who face religious extremism in Afghanistan, Pakistan and Bangladesh and intend to migrate to India. It also ignores the grief and security of the Rohingya Muslims who were forced to flee from the [Rakhine State](#) of Myanmar owing to ethnic cleansing and who are presently stateless. Moreover, restricting its application to minorities persecuted on religious grounds takes away from its ambit those who are persecuted based on other grounds such as political standing.

On secularism and constitutional morality

Speaking just after the independence, Jawahar Lal Nehru presented the following as '*the idea of India*', a phrase which remained in the limelight during the Parliamentary Debates on the Amendment Act:

"So far as India is concerned, we have very clearly stated as Government and otherwise, that we cannot think of any State which might be called a communal or religious State. We can only think of a secular, non-communal democratic state, in which any individual, to whatever religion he may belong, has equal rights and opportunities." ([Chishti, 2004 Indian Journal of Political Science, 183](#))

Though the word 'secular' was not explicitly mentioned in the Constitution since the beginning, it was made a part of the Preamble in 1976, following its recognition as a component of the basic structure back in [1973](#). In 1994, the [Supreme Court](#) attempted a combined reading of the right to equality and the principle of secularism and stated that:

"It is clear from the constitutional scheme that it guarantees equality in the matter of all individuals and groups irrespective of their faith emphasizing that there is no religion of the State itself. ... The concept of secularism is one facet of the right to equality woven as the central golden thread in a fabric depicting the pattern of the scheme in our constitution."

Therefore, the attempt of the Government to enact the Amendment Act enters into the prohibitive space. In the words of [S. R. Bommai v. Union of India](#), "the encroachment of religion into secular activities is strictly prohibited".

In his recent work, [Prof. M.P. Singh](#) notes that observance of '*constitutional morality is as important for the smooth working and survival of the Constitution as public morality is for the smooth working and survival of a society*'. Prof. Singh cites Dr. Ambedkar's speech identifying diffusion of constitutional morality as an indispensable condition for a government to have a peaceful working of a democratic constitution. While identifying the scope of the term, he cited the [Supreme Court](#) of India, which had stated that commitment to the Constitution is a facet of constitutional morality:

"The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflectible of action in an arbitrary manner."

The Amendment Act does everything but recognize adherence to constitutional morality. Even at the time of partition on religious lines, the constitutional drafters opted to base citizenship on the place of birth of an individual, without regard to their religion. Dr. Ambedkar was indeed prophetically correct when he stated that '*it is perfectly possible to pervert the Constitution, without changing its form by merely changing the form of the administration and to make it inconsistent and opposed to the spirit of the Constitution*'. The Amendment Act is one such unconstitutional step that affects the constitutional spirit by bringing in religious sentiments in a secular exercise of granting the right of citizenship, a right which is considered to be the [most important of all](#) as it is the prerequisite to enjoy civil rights in a country.

Setting a bad example

The Indian tradition towards citizenship proves at least one thing beyond debate: there has always been a negative bias towards Muslims in a country which claims to be secular. The Citizenship Amendment Act is one such manifestation and has implications connected with the idea of the National Register of Citizens. The Act has the potential to nullify the effect of any cut-off date when it comes to those six communities (Hindu, Jains ...) if they are able to trace their source of migration

to Pakistan, Afghanistan and Bangladesh, while denying the same opportunities to others, particularly Muslims. This anticipates a creation of large-scale stateless population.

Moreover, grave political consequences lurk underneath the Act. The Act presents the Indian dispensation as a Hindu state and it might change the political attitude of the leaders of the neighbouring nations and [weaken the political rights of religious minorities](#) beyond India.

